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**BUFORD K. HACKNEY, Appellant** )  
) )  
**and** ) **Docket No. 04-436**  
) **Issued: June 21, 2004**  
) )  
**DEPARTMENT OF LABOR, MINE SAFETY &** )  
**HEALTH ADMINISTRATION, Pikesville, KY,** )  
**Employer** )  
) )

### Case Submitted on the Record

ALEC J. KOROMILAS, Chairman  
COLLEEN DUFFY KIKO, Member  
MICHAEL E. GROOM, Alternate Member

On December 9, 2003 appellant filed a timely appeal of a November 17, 2003 merit decision by the Office of Workers' Compensation Programs which denied modification of a September 27, 2002 decision. In the September 27, 2002 decision, the Office terminated appellant's compensation for refusal to accept suitable employment. As the November 17, 2003 merit decision was within one year of appellant's filing of an appeal, the Board has jurisdiction over the merits of his claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

The issue is whether the Office properly terminated appellant's compensation for refusal to accept suitable employment.

## **FACTUAL HISTORY**

The case has been on appeal previously.<sup>1</sup> In a November 22, 1999 decision, the Board found that a conflict existed in the medical evidence on whether appellant could perform the duties of the position of mine safety and health specialist. Dr. Jeffrey McConnell, a Board-certified orthopedic surgeon and Office referral physician, stated that appellant could perform the duties of the offered position for eight hours a day. He concluded that appellant's numbness in the legs was not due to lumbar radiculopathy arising from his employment injury but was caused by peripheral neuropathy that was related to his diabetes. Dr. Vinodchandra Modi, an attending Board-certified internist, diagnosed severe obstructive pulmonary disease, insulin-dependent diabetes, chest pain radiating into the left arm and low back pain radiating into his legs. He concluded that appellant was totally disabled for work. The Board reversed the Office's October 6, 1997 termination decision.

The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. Clifford Carlson, a Board-certified physiatrist, for an impartial medical examination to resolve the conflict in the medical evidence. In the statement of accepted facts, the Office stated that the physical requirements of the offered position included sitting at a desk with freedom to move about the office as needed, lifting no more than 10 pounds, and occasional bending and kneeling. It noted that the hours of work would normally be eight hours a day, five days a week.

In a May 19, 2000 report, Dr. Carlson reported that appellant had no current evidence of radiculopathy. He noted that appellant showed some limitations for lumbar range but that testing did not satisfy validity requirements. He indicated that x-rays showed fairly significant degenerative disease, including facet arthropathy and bulging discs at several levels, as well as a herniated nucleus pulposus which was treated by laminectomy and discectomy. An electromyogram (EMG) and nerve conduction studies revealed evidence for peripheral neuropathy but not radiculopathy. Dr. Carlson noted that appellant complained of disabling pain in his back and legs but added that the physical findings did not support his complaints of pain. He diagnosed chronic lumbosacral strain/sprain syndrome with aggravation of degenerative disc disease and post-laminectomy syndrome. He reported that appellant was also treated for diabetes and chronic obstructive pulmonary disease. Dr. Carlson reviewed the physical requirements of the job offered to appellant, noting accommodations for appellant of lifting 10 pounds and sitting restricted to 30 minutes at a time. He concluded that the accommodations were acceptable and appellant could perform the duties of the offered position. Dr. Carlson noted that the job required driving but appellant claimed he could not drive. He stated that, based on the physical examination and orthopedic conditions of the lumbosacral spine, he saw no reason that appellant could not drive. He reported that appellant had reached maximum medical improvement and further treatment would not substantially change his condition. He recommended that appellant receive continued symptomatic management, including a prescription of nonsteroidal anti-inflammatory or other analgesic medicine, as well as a home exercise program and treatment with modalities at times.

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<sup>1</sup> Docket No. 98-1105 (issued November 22, 1999). The history of the case is contained in the prior decision and is incorporated by reference.

In an accompanying work capacity evaluation, Dr. Carlson indicated that appellant could sit 8 hours a day, walk 3 hours a day, stand 3 hours a day, reach above his shoulder for a total of 1 hour a day, twist up to 2 hours a day, and operated a motor vehicle for 2 to 3 hours a day, 30 minutes at a time. He reported that appellant could push, pull and lift up to 10 pounds and could squat and kneel occasionally. Dr. Carlson recommended that appellant have breaks of 5 to 10 minutes every 30 minutes.

The Office referred appellant to Dr. Syed Rasheed, a Board-certified internist, for a second opinion on the effects of appellant's diabetes on his ability to perform the offered position. In a January 22, 2002 report, Dr. Rasheed stated that appellant had type II diabetes mellitus that was currently well controlled. He could not find any reason that appellant's diabetes would prevent him from performing duties on any job. Dr. Rasheed reported that appellant had no evidence of retinopathy and had 20/20 vision. He noted that the heart, lungs, peripheral artery and peripheral venous system were normal. Dr. Rasheed stated that he could not objectively demonstrate any evidence of peripheral neuropathy. He commented that there were inconsistencies in the description of symptoms in appellant's visual disturbance which would commonly be seen with a patient with extremely variable blood sugars. Dr. Rasheed concluded that neither was present. He stated that appellant's blood sugar was well controlled and he had no evidence of retinopathy. Dr. Rasheed reported that appellant's complaints of peripheral neuropathy were out of proportion with his objective findings. He stated that appellant's diabetes did not limit him from doing any job or procedure. He indicated that appellant's diabetes did not preclude him from driving because his eyesight was normal and his blood sugar was tightly controlled.

The Office referred appellant to Dr. Michael B. Baron, a Board-certified pulmonologist, for a second opinion on his pulmonary condition. In a January 23, 2002 report, Dr. Baron indicated that appellant's oxygen saturation was at 94 percent at rest. He reported that pulmonary function tests showed very mild small airways disease. Dr. Baron noted that chest x-rays showed some calcified granulomata consistent with old histoplasmosis or tuberculosis and some minimal interstitial disease in the periphery. He stated that the objective findings correlated with appellant's objective complaints such that he was not limited by his breathing. Dr. Baron diagnosed bronchitis because appellant had chronic production of sputum. He stated that appellant's pulmonary condition did not preclude him from driving. In an accompanying work capacity evaluation, Dr. Baron indicated that appellant could sit two hours a day, stand four hours a day, walk four hours a day and operate a motor vehicle for less than an hour a day. In a March 15, 2002 report, Dr. Baron stated that the only restriction due to appellant's pulmonary disease was in walking and climbing. He related that appellant reported that he could only walk 500 to 600 feet before he became short of breath. Dr. Baron stated that this restriction did not seem to be primarily due to his pulmonary condition, but was most likely due to his obesity and deconditioning. He concluded that appellant could not climb more than 1 to 2 flights of stairs or walk more than 500 to 600 feet.

In an April 29, 2002 report, Dr. Dinker N. Patel, an attending internist, stated that appellant had backache and radiation of pain to both legs with numbness in the left leg. He diagnosed lumbar disc syndrome, peripheral neuropathy related to lumbar radiculopathy, and insomnia related to back pain.

The Office, in a June 3, 2002 letter, asked Dr. Carlson to review the reports of Dr. Rasheed and Dr. Baron and the job description of the mine safety and health specialist position offered to appellant. The Office described the physical restrictions of the job as lifting and carrying no more than 10 pounds on an occasional, intermittent basis. The job would not require working at heights or heavy physical exertion such as climbing. The job was located in Duluth, Minnesota. The Office asked whether appellant could perform the duties of a mine safety and health specialist. Dr. Carlson marked "yes" on the form provided by the Office. In an accompanying June 18, 2002 work capacity evaluation, he gave the same restrictions that he had provided previously with the only changes that appellant could walk or stand two hours a day.

In a July 22, 2002 letter, the employing establishment offered the position of mine safety and health specialist to appellant. The position was outside of appellant's commuting area, and provided for relocation expenses. Appellant would be required to sign a one-year employment agreement prior to the finalization of travel arrangements. The employing establishment stated that the Office would determine whether the job was suitable for appellant based on his physical limitations and any reasons he gave for declining the job.

By letter dated August 9, 2002, the Office advised appellant that it had found the offered position to be suitable, that he had 30 days to accept the position or provide reasons for refusing it, and that claimants who refused suitable work were not entitled to compensation.

In an August 22, 2002 note, appellant stated that he declined the offered position due to his health problems. He submitted an undated report, received by the Office on September 3, 2002, from Dr. Patel who stated that appellant continued to have severe back pain with numbness in the left leg. Dr. Patel noted that appellant had degenerative disc disease, diabetes mellitus, hypercholesterolemia, peripheral neuropathy and vision problems with 20/30 vision in his left eye and 20/40 vision in his right eye. He contended that appellant would have difficulty seeing, bending, stooping, kneeling, twisting and lifting. Dr. Patel pointed out that Dr. Carlson stated that appellant could not operate a motor vehicle for more than 30 minutes at a time and could not push, pull or lift more than 10 pounds of weight at a time. He stated that appellant, due to his medical problems, would be unable to perform his job which required considerable time in walking, sitting and standing, and included activities which required bending, squatting, kneeling, climbing, twisting and lifting. Dr. Patel noted that appellant had been found disabled by the Social Security Administration. He concluded that appellant would not be able to perform the duties of the offered position.

In a September 11, 2002 letter, the Office stated that Dr. Patel had not provided adequate medical rationale with objective findings to support that he continued to be totally disabled from the sedentary light-duty position. The Office commented that Dr. Carlson had concluded unequivocally that appellant could perform the duties of the offered position. The Office indicated that it had reviewed appellant's reasons for refusing the job offer and found them to be unacceptable. The Office gave appellant 15 days to accept the position. It indicated that, if appellant continued to refuse the job or failed to give a written response within that time, it would terminate his compensation. Office confirmed that the job with the employing establishment was still available.

In a September 27, 2002 decision, the Office terminated appellant's compensation effective October 5, 2002 for refusal to accept suitable employment.

Appellant submitted an October 21, 2002 report from Dr. Norman Rexrode, Board-certified in emergency medicine, who stated that appellant had sustained a lumbar strain, and lumbar disc disease due the employment injury which required surgery. He indicated that appellant also had diabetes, depression and chronic pain down both legs. Dr. Rexrode added that appellant had a transient ischemic attack and an infarction of the right cerebellar hemisphere in October 1999 and was found to have bilateral carotid stenosis. He concluded that appellant would be unable to be gainfully employed. Appellant submitted a report from a November 7, 2000 magnetic resonance imaging (MRI) scan that showed appellant had a right cerebellar lesion. Appellant also submitted an October 15, 2002 report from Dr. Patel who essentially restated his findings and conclusion from his previous report.

In a September 15, 2003 letter, appellant requested reconsideration. In a November 17, 2003 merit decision, the Office denied modification of the September 27, 2002 decision.

### **LEGAL PRECEDENT**

Section 8106(c)(2) of the Federal Employees' Compensation Act states: "a partially disabled employee who: (1) refused to seek suitable work; or (2) refuses or neglects to work after suitable work is offered is not entitled to compensation."<sup>2</sup> It is the Office's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.<sup>3</sup> To justify such a termination, the Office must show that the work offered was suitable.<sup>4</sup> An employee who refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was justified.<sup>5</sup>

### **ANALYSIS**

Following reversal of the Office's October 6, 1997 suitable work termination based on a conflict of medical opinion, the Office properly selected Dr. Carlson as the impartial medical specialist on the issue of appellant's capacity for work. In a May 19, 2000 report, Dr. Carlson indicated that appellant's complaints were not supported by the objective findings on examination. He pointed out that appellant's complaint of numbness in the legs was the result of peripheral neuropathy, not radiculopathy, but that such complaints did not render appellant totally disabled from employment. He concluded that appellant was able to perform the modified duties of a mine safety and health specialist. The Office sought second opinions on whether appellant's chronic obstructive pulmonary disease or diabetes would affect his ability to work. Dr. Rasheed concluded in a January 22, 2002 report that appellant's diabetes would not prevent him from performing the duties of the offered position. Dr. Baron indicated in a

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<sup>2</sup> 5 U.S.C. § 8106(c)(2).

<sup>3</sup> *Marie Fryer*, 50 ECAB 190, 191 (1998).

<sup>4</sup> *Harry C. Garza*, 52 ECAB 205, 207 (2001).

<sup>5</sup> 20 C.F.R. § 10.124; *see Howard Y. Miyashiro*, 51 ECAB 253, 255 (1999).

January 23, 2002 report that appellant's chronic obstructive pulmonary condition would not prevent him from performing the duties of a mine health and safety specialist. The Office requested that Dr. Carlson review the reports of Dr. Rasheed and Dr. Baron and determine whether appellant could perform the duties of the offered position. He reconfirmed his opinion that appellant could perform the duties of the selected position. Dr. Carlson's opinion as an impartial specialist is based on his findings on examination and do not support appellant's disability for work. His report is entitled to special weight and, under the circumstances of this case, represents the weight of the medical evidence.<sup>6</sup> The weight of his report is enhanced by the reports of Dr. Rasheed and Dr. Baron that appellant's conditions unrelated to his employment injury do not prevent him from performing the offered position. These reports are sufficient to satisfy the Office's burden of showing that the job offered to appellant was suitable. The Office properly terminated appellant's compensation when he refused the offer of the mine safety and health specialist position.

Subsequent to the Office's termination of appellant's compensation, Dr. Rexrode indicated that he had a transient ischemic attack and an infarction of the right cerebellar hemisphere in October 1999. Dr. Rexrode also noted that appellant had bilateral stenosis of the carotid arteries. Since the Office had shown that the offered position was suitable based on appellant's restrictions at that time, the burden shifts to appellant to show that his or her refusal to work in that position was justified.<sup>7</sup> Dr. Rexrode's opinion that appellant could not work due to the transient ischemic attack and the infarction of the right cerebellar hemisphere, as well as the stenosis of the carotid arteries is not sufficiently rationalized to overcome Dr. Carlson's opinion that appellant could return to work. Dr. Rexrode did not explain how these conditions would prevent appellant from working at the offered position. Dr. Rasheed addressed appellant's vascular condition noting no objective evidence of neuropathy. Dr. Baron found that appellant's bronchitis condition did not preclude appellant's employment. These reports were reviewed by the impartial medical specialist, who modified the work restrictions pertaining to walking and standing. The reports of Dr. Patel merely reiterated his prior opinion finding total disability. Dr. Carlson's opinion as the impartial medical specialist is of special weight and supported by Office's termination of wage-loss benefits based on appellant's refusal of suitable work.

### **CONCLUSION**

The Board therefore finds that the Office met its burden of proof in establishing that appellant refused suitable work and therefore properly terminated his compensation.

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<sup>6</sup> *Michael Hughes*, 52 ECAB 387, 390 (2001).

<sup>7</sup> *Gloria J. Godfrey*, 52 ECAB 486, 488 (2001).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated November 17, 2003 be affirmed.

Issued: June 21, 2004  
Washington, DC

Alec J. Koromilas  
Chairman

Colleen Duffy Kiko  
Member

Michael E. Groom  
Alternate Member